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Supreme Court, U.S.
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No. 97-664

In The

Supreme Court of the United States

October Term, 1997

JOSEPH SETTLES and IOANE TUA,

Petitioners,

vs.

MICHAEL PENILLA, Administrator of the Estate of Juan Penilla, Deceased,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court grant certiorari to determine whether the "danger enhancement" rule of *DeShaney v. Winnebago County Soc. Servs. Dept.*, 489 U.S. 189 applies to law enforcement officers responding to a "911 call" where they find a person in serious need of medical care and unconscious and then proceed to cancel the request for paramedics that had been made by bystanders who were rendering aid and then proceed to drag the unconscious person into his empty home and lock him behind closed doors thus rendering aid to him impossible.

2. Should the Court grant certiorari to determine whether police officers violated a person's Fourth Amendment rights against unreasonable search and seizure where the Officers in responding to a "911 call" find a person in serious need of medical care and unconscious outside of his home who then proceed to cancel the request for paramedics that had been made by bystanders who were rendering aid and then proceed to forcibly break into the person's empty home and drag him into it and leave the person behind locked closed doors unable to receive any medical care or further bystander assistance.

LIST OF PARTIES

1. Joseph Settle;

2. Ioane Tua;

3. Michael Penilla, as the administrator of the Estate of Maria Penilla, now deceased;

4. Michael Penilla, who has succeeded Maria Penilla as administrator of the Estate of Juan Penilla, deceased.

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STATEMENT OF THE CASE

This is a civil rights case. Its genesis was the 1994 death of Juan Penilla ("Penilla"). Petitioners are two police officers who responded to a "911 call" and found Penilla in serious medical need outside his empty home being assisted by a neighbor and passerby. The officers canceled the "911" request for paramedics then proceeded to force entry into the home and dragged Penilla inside the empty house and left him behind the locked door where he was found the next day dead from respiratory failure. *Penilla v. Huntington Park*, 115 F.3d 707 (1997).

Petitioners consistently throughout the proceedings below and to this Court have attempted to characterize the Penillas' allegations as a claim that police officers have a duty to provide emergency medical care to a person when they find him in serious need of medical care. Both the district court and the Ninth Circuit found that the officers in this case took actions that significantly increased the risk facing Penilla: they canceled the 911 call to the paramedics; they dragged Penilla from his porch, where he was in public view, into an empty house; they then locked the door; and left him there alone and they did so *after* they had examined him and found him to be in serious medical need. *Penilla v. Huntington Park*, 115 F.3d 707, 710 (1997).

Both the district court and the Ninth Circuit agreed that the officers' conduct made it impossible for anyone to provide emergency medical care to Penilla. *Penilla v. Huntington Park*, 115 F.3d 707 (1997).

STATEMENT OF JURISDICTION

Penilla's Estate and Maria Penilla sued Petitioners in the district court. Of the seven counts which make up the complaint,

the Petitioners address only two in this Petition. The first which is made by Mr. Penilla's estate, under 42 U.S.C. § 1983 alleges that the officers' affirmative conduct deprived Penilla of his right to life without due process of law in violation of the Fourteenth Amendment.

It is also alleged that the officers violated Penilla's Fourth Amendment rights against unreasonable search and seizure by breaking into his home knowing he was in serious need of medical care, dragging him inside and then leaving him locked inside preventing him from receiving any help.

The second claim is for the violation of Maria Penilla's own rights under the Fourteenth Amendment for a deprivation of her liberty interest in her familial relationship with her son, decedent Penilla.[1]

REASONS FOR DENYING THE WRIT

I.

THE LAW IS WELL SETTLED THAT IF AFFIRMATIVE CONDUCT ON THE PART OF A STATE ACTOR PLACES A PLAINTIFF IN DANGER AND THE OFFICERS' ACT IN DELIBERATE INDIFFERENCE TO THAT PLAINTIFF'S SAFETY A CLAIM ARISES UNDER § 1983.

This Court has recognized that the due process clause does not generally confer "affirmative rights to governmental aid, even where such aid may be necessary to secure life, liberty, or

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1. Maria Penilla died during the pending of the appeal before the Ninth Circuit and her estate was substituted into the action. The Ninth Circuit did not reach the issue of what rights survived her death. *Penilla v. Huntington Park*, 115 F. 3d 707, 710 (1997).

property interest of which the government itself may not deprive the individual." *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 197 (1989). However, the Court in *DeShaney* did recognize "that in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198.

Petitioners cite various cases which have denied § 1983 liability under circumstances, arguably, analogous to this case. For example, in *Archie v. City of Racine*, 847 F.2d 1211 (CA 7 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989), the Seventh Circuit held that fire department dispatchers were not liable under § 1983 for the death of a woman caused by an alleged failure of dispatchers to dispatch rescue services to a woman who subsequently died. The *Racine* court concluded that the defendants had not "deprived" the woman of life within the meaning of the Fourteenth Amendment. *Archie v. City of Racine*, 847 F.2d 1211 at 1223, (CA 7 1987) (en banc).

The issue presented in Penilla's case is whether an individual's substantive due process rights are triggered when the state's affirmative conduct creates or enhances a danger.

Here, Penilla contends the Petitioners' affirmative conduct deprived Mr. Penilla of life without due process of law. Penilla alleges that Petitioners, in responding to a "911" call from Mr. Penilla's neighbors, carried an unconscious Mr. Penilla inside his house, laid him on the floor, locked the front door, and called off the paramedics. It is this alleged affirmative conduct which Penillas contend forms the basis of their § 1983 claims against the defendants.

Although Penilla's illness was not caused by Petitioner's affirmative conduct, it placed Mr. Penilla in a more dangerous

situation than the one in which they found him. By removing Mr. Penilla from public view and by locking the front door, the Petitioners made it impossible for anyone to provide emergency medical care to Mr. Penilla. Because the Petitioners increased the risk that Mr. Penilla would die from his illness, Petitioners' affirmative conduct triggered a constitutional duty. These allegations were found sufficient by both the district court and the Ninth Circuit to conclude that Plaintiff had alleged sufficient facts to state a § 1983 claim against Petitioners.

Petitioners incorrectly contend that under *DeShaney*, a constitutional duty can only be triggered if Mr. Penilla was in custody. The language in *DeShaney*, however, does not require that Mr. Penilla be in custody in order for a constitutional duty to be triggered. This Court in *DeShaney* focused not only upon the custody issue but also upon the role that the state played in creating or enhancing the danger the victim in *DeShaney* faced. In *DeShaney*, a child had been severely beaten by his father after the social workers ignored complaints that the child was being abused by his father and after the social workers failed to remove the child from the father's custody.

In reaching its holding, the *DeShaney* Court reasoned as follows. First, the harm to the child in *DeShaney* did not occur while he was in the state's custody. 489 U.S. at 201. Second, although the state was aware of the dangers that the child faced, the state "played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* And third, the state's return of the child to his father, after the state had temporary custody of the child, placed the child "in no worse position than that in which he would have been had it [the state] not acted at all." *Id.*

As the district court and the Ninth Circuit rightly concluded this is not a matter of simple allegations that the state failed to

provide medical attention. The Penillas summarized the basis for their allegations of due process violations as follows: Petitioners affirmatively placed Mr. Penilla in a position of danger, and committed themselves to the protection of Mr. Penilla by undertaking affirmative acts which contributed to his danger and risk of harm and injury.

Ninth Circuit precedent in this area establishes that the Penillas have a viable claim against Petitioners. *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951, 113 S. Ct. 2442 (1993). In *Grubbs*, the Ninth Circuit concluded that state custody was not a prerequisite to a due process claim. *Grubbs*, 974 F.2d at 120. Petitioners' authorities from other circuits are not controlling and unpersuasive. The Circuit further confirmed that under the "danger creation" exception, where state employees create a danger or increase the risk of an existing danger, a constitutional right to protection arises. *See generally*, *Id.* at 121.

As recited above, the Penillas rely on more than allegations of a denial of medical care. They amply plead a startling set of facts that supports their ultimate contention that Mr. Penilla's plight was significantly worsened by the conduct of the Petitioners.

Petitioners attempted to distinguish *Grubbs* from the present case on the shallow grounds that they did not create the danger which Mr. Penilla faced. Their attempt is unconvincing and not supported by the authority upon which *Grubbs* is based.

In *Grubbs*, the plaintiff was a woman who was assaulted, battered, kidnapped and raped by an inmate/sex offender from the custodial institution where plaintiff worked. *Id.* at 120. The court permitted her to proceed with her due process claim against her supervisors who knew that the inmate would very likely commit a violent crime if left with a woman. *Id.*

The court also noted that the allegations that the supervisor *enhanced* the plaintiff's vulnerability to the danger supported a finding of liability under § 1983. *Id.* at 121-122.

Likewise, in *Wood v. Ostrander*, 879 F.2d 483 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S. Ct. 341, 112 L. Ed. 2d 305 (1990), where the court settled and established the "danger creation" exception as controlling law in the Ninth Circuit, the court relied on its prior distinction of a scenario where police officers did not cause the injury and where such officers "create or *exacerbate the danger*." *Id.* at 594 (emphasis added).

As indicated by the above authority, it was well-settled in the Ninth Circuit that where a state employee's conduct enhances or exacerbates the risk or danger a person finds himself or herself in, a constitutional duty to provide protection arises.

This right being clearly established when the Petitioners intervened to worsen Mr. Penilla's plight, they are not shielded from liability by qualified immunity.

II.

THE LAW IN OTHER CIRCUITS IS IN ACCORD WITH THE POSITION OF THE NINTH CIRCUIT THAT WHERE STATE ACTION ENHANCES THE DANGER TO PLAINTIFF THE DUE PROCESS CLAUSE IS TRIGGERED BY THE OFFICERS' AFFIRMATIVE CONDUCT.

The law in other circuits is in accord with this position. For example, in *Wideman v. Shallowford Community Hospital, Inc.*, 826 F.2d 1030, 1035 (11th Cir. 1987), the court stated:

> [A] constitutional duty can arise only when a state or municipality, by exercising significant custody or control over an individual, places that person in a worse situation than he would have been had the government not acted at all. Such a situation could arise by virtue of the state affirmatively placing an individual in a position of danger effectively stripping a person of her ability to defend herself, *or cutting off potential sources of private aid.*

Even the authority which Petitioners rely upon compels the conclusion that they are to be held constitutionally accountable under the facts alleged by the Penillas. For example, the court in *Archie v. City of Racine*, 847 F. 2d 1211, 1223 (7th Cir. 1987) (*en banc*), concluded that in circumstances such as those alleged by the Penillas, a duty to protect arises. The court stated:

> When the state puts a person in danger, the due process clause requires the state to protect him to the extent of ameliorating the incremental risk. *When a state cuts off sources of private aide, it must provide replacement protection.*

Id.

The dispatcher in *Archie* refused to dispatch aid to the plaintiff, and the court notes that this act did not make worse the plaintiff's plight, she was not prevented from calling others or from otherwise receiving assistance. *Archie* at 1223.

Unlike the acts of the dispatcher in *Archie*, the conduct of Petitioners severely exacerbated Mr. Penilla's plight and eliminated any chance he had of survival. Had they not broken through his door and dragged him inside and canceled the paramedics and emergency medical assistance which was on its

way, Mr. Penilla would have received the continued assistance of his neighbors and would have been the beneficiary of paramedic and medical attention.

Petitioners' contention that they did not kill Mr. Penilla, but rather his illness did, under the circumstances presented here, Mr. Penilla would not have died from his illness absent the conduct of Petitioners.

The case of *Rogers v. City of Port Huron*, illustrates with almost identical facts, how the application of the "danger creation" exception to the facts of the present case conclusively results in the finding that Mr. Penilla's rights to due process were violated. *Rogers v. City of Port Huron*, 833 F. Supp. 1212 (E.D. Mich. 1993).

In *Rogers*, the defendant police officers responded in the early morning hours to a call of a "man down" and found the subject of the call lying unconscious on the grassy lawn area next to the curb. *Id.* at 1214. This man was unconscious and unresponsive, smelled of liquor, breathing normally and had no signs of injury. *Id.*

The officers determined that no bystander knew the person and told them to "let him sleep it off", and that they would later check on him. *Id.* at 1215. The officers did not summon or provide medical assistance for the man as he did not appear to be in immediate danger. *Id.*

Tragically, the man was later found by bystanders in the street, with blood coming from his ear. *Id.* The man never recovered from his injuries and died as a result. *Id.*

Marshalling the facts of the case, the court concluded that the officers nonaction "did nothing to alter the danger faced by

Decedent; and the Officers did not create the danger." *Id.* at 1220-1221. The court further added that the "Officers did not intrude upon and alter the personal security of Decedent . . . [,and] the Officers' actions cannot be said to have prevented bystander help." *Id.*

The facts in the present case are significantly different and give rise to a constitutional violation. Unlike the *Rogers* subject, Mr. Penilla was found in dire need of emergency medical attention. Moreover, emergency medical assistance had been summoned and was on its way to assist Mr. Penilla.

Unlike the *Rogers* officers, who did nothing more than attempt to identify the subject, Petitioners undertook a truly alarming course of conduct. Not only did they move Mr. Penilla, they broke into his home, dragged him inside, and then locked the door behind them. In doing so, further help from bystanders was eliminated. Furthermore, the Petitioners ensured that Mr. Penilla would succumb to his illness by canceling the emergency medical attention which was in route.

The conduct of Petitioners significantly altered the danger which Mr. Penilla faced before they arrived and foreclosed bystander and emergency medical assistance. This conduct supports the Penillas' claims of due process violations.

An alternative and appropriate analysis is also available to this court for evaluating the Penillas' Fourteenth Amendment claim. A constitutionally cognizable claim under the Fourteenth Amendment exists where the state cuts off sources of private aid and does not provide replacement protection. *See Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990).

In *Ross*, the court was faced with allegations similar to the present which "[portrayed] a stunning abuse of governmental

power." *Id.* at 1424. There, a 12-year-old boy fell into Lake Michigan and a friend ran for help. *Id.* at 1424. Emergency personnel from one jurisdiction as well as bystanders responded. *Id.* Another jurisdiction, however, with authority in the area of the incident had a policy in place which limited the persons who were authorized to provide rescue services. *Id.* at 1424-25.

Based on this policy, one of this jurisdiction's police officers ordered all persons to cease their rescue efforts and positioned his boat so as to prevent the rescue attempts. *Id.* at 1425. Lamentably, as a result of the delay caused by the officers interference, the boy who had fallen into the water died. *Id.* The court concluded that "a citizen in peril for his life had a constitutional right that prevented a police officer from cutting off private avenues of lifesaving rescue without providing an alternative." *Id.* at 1432.

Because of the interference of the officer in *Ross* the rescue efforts were halted and/or made ineffective; here, because of the affirmative acts of defendants Petitioners, the efforts and measures to assist Mr. Penilla were eliminated. The conduct of the Petitioners is certainly more egregious than that of the *Ross* deputy. Petitioners physically took and secured Mr. Penilla away from the people that had attempted to help him, and they called off the professional medical assistance that was in route to attend to Mr. Penilla.

III.

THE PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY ON A CLAIM THAT THEY VIOLATED PENILLA'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE WHERE THE FACTS ALLEGED THE POLICE OFFICERS FORCIBLY ENTERED A PERSON'S HOME WITHOUT CONSENT OR A WARRANT AND DRAGGED THE PERSON WHO WAS UNCONSCIOUS INTO THE EMPTY HOUSE WHERE HE WAS PREVENTED FROM RECEIVING ASSISTANCE FROM NEIGHBORS AND EMERGENCY CARE THAT HAD BEEN SUMMONED.

The Fourth Amendment's restriction against warrantless entries into one's home provides that such entries are per se unreasonable unless they fall within a recognized exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 576, 585 (1967).

Such an exception is the emergency aid doctrine, which provides that the police may enter a dwelling to render emergency aid to a person whom they reasonably believe to be in distress and in need of help. *United States v. Dunavan*, 485 F.2d 201 (1973).

No legitimate reason existed which would have permitted Petitioners to break into Mr. Penilla's home.

Petitioners contend there can be no § 1983 liability when they were merely helping Penilla into his home. This assumes, however, that Mr. Penilla was going into his home before they intervened. He was not. Absent the Petitioner's intervention, Mr. Penilla was going to the hospital.

The emergency which the Petitioners encountered was not

in Mr. Penilla's home, it was on his porch. Because they had no reasonable grounds to believe an emergency was afoot in Mr. Penilla's home, the authority Petitioners rely on is inapposite.

Any argument that Petitioners may make about exigent or emergency circumstances only buttresses the Penillas' contention that Mr. Penilla should have been permitted to benefit from the assistance of his neighbors and the attention of the paramedics and the emergency medical aid which was in route.

Ultimately, the district court and the Ninth Circuit concluded that whether the exception to the warrant requirement justified the entry into Mr. Penilla's home was a question of fact.

The Penilla's respectfully submit that given facts of the present case no question exists as to the impropriety of the entry.

CONCLUSION

For all the foregoing reasons this Petition should be denied.

Respectfully submitted,

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